Supreme Court, U. S.
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In The
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-854

PROVIDENCE HOSPITAL,

Petitioner,

vs.

MANHATTAN CONSTRUCTION COMPANY OF TEXAS, E. C. ERNST, INC., CHARLES H. McCAULEY ASSOCIATES, INC., AND FAIRBANKS-MORSE, INC.,

Respondents.

BRIEF OF RESPONDENT MANHATTAN CONSTRUCTION COMPANY OF TEXAS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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January 24, 1978

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Respondent, Manhattan Construction Company of Texas ("Manhattan") respectfully submits this brief in opposition to the Petition for a Writ of Certiorari filed by Providence Hospital ("Providence").

QUESTION PRESENTED

Should a writ of certiorari issue to review a decision of the Court of Appeals which does not violate the standards of Supreme Court Rule 19?

STATEMENT OF THE CASE

This case arose from a series of disputes between the parties during the construction and renovation of a hospital in Mobile, Alabama. The parties are Ernst, an electrical subcontractor; Manhattan, the general contractor; Providence Hospital, the owner; McCauley, the architect; and Fairbanks-Morse, Ernst's electrical supplier.

The action was commenced by Ernst on October 28, 1970. After more than four years of proceedings and a forty-day bench trial, the District Court for the Southern District of Alabama entered its lengthy opinion, 387 F.Supp. 1001 (S.D. Ala. 1974).

On December 16, 1970, in response to Ernst's Complaint and Manhattan's Answer and Cross-Claim, Providence filed a "Motion to Dismiss" and alternatively "to Stay the Action." The requested "stay" was not for purposes of resorting to arbitration but to require Manhattan to finish construction first. Attached to the motion was a copy of the twenty page general conditions of the contract, paragraph 6 and 7 of which concerned arbitration. Providence filed a supplemental brief

which referred to arbitration but only as a ground for dismissing Manhattan's suit. For the next two and one-half years Providence litigated – it engaged in discovery, presented cross-claims (trying to appeal to the Circuit Court of Appeals for the Fifth Circuit from dismissal of some of them), and filed various motions. It at no time sought to start arbitration. In fact, Providence at one time stated that if Manhattan should persist in its efforts to arbitrate, Providence would prevent same by filing a lawsuit.

The trial court held that the failure to invoke the provisions of permissive arbitration is the equivalent of a waiver of such provisions and found that the inactions of Providence in this regard was testament to such waiver.

The Court of Appeals affirmed, [551 F.2d 1026 (5th Cir. 1977) rehg. 559 F.2d 268 (5th Cir. 1977).]

ARGUMENT

Providence in its Petition for a Writ of Certiorari presents three questions for this Court to decide:

> 1. Does a defendant forfeit benefits of a contractual dispute settlement procedure requiring arbitration as a prior condition to suit by moving to dismiss a contract claim, never presented to arbitration, for failure to state a claim upon which relief can be granted?

2. Are courts bound by contractual provisions specifying time limitations on filing and appealing claims and restricting remedies where a party to the contract waives the forum of arbitration?

3. Is the construction by a district court of a purported "no damage" clause in a construction contract entitled to deference unless clearly erroneous under Rule 52(a) F.R.Civ.P.?

However, questions 1. and 2., when stripped of their legalese and excess verbiage are really one. (The third question presented by Providence should be ignored since it is not based upon any finding of the trial court upon which an implied finding could be based. Burgess Const. Co. v. Morrin & Son Co., Inc., 526 F.2d 108 (10th Cir. 1975) does not support Providence's contention.)

Contrary to what Providence would have this Court believe by the wording in its first two questions, the Court of Appeals did not rule that Providence forfeited its right to arbitration by filing a motion to dismiss a contract for failure to state a claim upon which relief can be granted. Rather, the Fifth Circuit held that Providence waived arbitration in view of its pattern of pre- and post-suit behavior. Specifically, as to Providence's post-suit behavior, the Court noted that after the complaint was filed, Providence filed a "Motion to Dismiss" Manhattan's claims and alternatively, to "stay the action" (not for purposes of resorting to arbitration). It wasn't until

two and one-half (2-1/2) years later, and after Providence had actively litigated the lawsuit through discovery, cross-claims and various motions, that it sought arbitration.

It is clear that Providence did not merely file a motion to dismiss, but actively participated in and beyond the initial or preliminary proceedings and Manhattan submits that the Fifth Circuit's decision that this involvement constituted a waiver of the right to arbitration is in accord with the Federal Arbitration Act, 9 U.S.C.A. §3, and decisions of other Courts of Appeals.

Section 3 of the Federal Arbitration Act, supra, states:

"3. Stay of proceedings where issue therein referable to arbitration.

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration." (Emphasis added)

In the following cases, Courts of Appeals have held, pursuant to the aforementioned section of the Federal Arbitration Act, that a party is in default and waives his right to arbitration when he actively participates in the litigation beyond initial or preliminary proceedings.

In Radiator Specialty Co. v. Cannon Mills, Inc., 97 F.2d 318, 117 ALR 299 (4th Cir. 1938), the defendant, a purchaser under a contract for the sale of goods, rather than immediately asserting his right to arbitration upon the filing of plaintiff's complaint, appeared and filed an answer, set up a counterclaim, delayed for three (3) months before filing and being granted a motion for continuance, and allowed another six (6) months to expire before, on the day expressly agreed for the trial, asserting the right to arbitration. The Fourth Circuit held that the defendant waived his right to arbitration and was "in default" in proceeding with arbitration within the meaning of the Federal Arbitration Act, saying:

> "[I]t is clearly the intention of Congress to provide that the party seeking to enforce arbitration can do so only when not guilty of dilatoriness or delay. One having the right to arbitrate and to stay an action at law, pending arbitration under this statute, may waive such right.
>
> . . . .
>
> "By setting up a counterclaim for damages the defendant not only submitted to the jurisdiction of the court where the cause was pending, but expressly invoked that jurisdiction."

In Cornell & Co. v. Barber & Ross Co., 242 F.Supp. 825, aff. 123 App. D.C. 378, 360 F.2d 512 (Dist. of Col. Cir. 1966), before the defendant filed a motion for a stay to permit arbitration, he had moved for a transfer of venue, filed an answer and a counterclaim, and filed notice of depositions, took a deposition and procured the production of various records and documents. The District of Columbia Circuit noted that the litigation machinery had been "substantially invoked and the parties were well into the preparation of a lawsuit by the time . . . an intention to arbitrate was communicated by the defendant to the plaintiff," and that the defendant was in default with arbitration within the meaning of the Federal Arbitration Act. The Court said:

> "The right to arbitration, like any other contract right, can be waived. A party waives his right to arbitrate when he actively participates in a lawsuit or takes other action inconsistent with that right. Once having waived the right to arbitrate, that party is necessarily 'in default in proceeding with such arbitration.' "

And in American Locomotive Co. v. Chemical Research Corp., 171 F.2d 115 (6th Cir. 1948) cert. den. 336 U.S. 909, a delay of more than seven (7) years in moving, under the Federal Arbitration Act, for a stay of an action on a contract, was held to constitute a default, even though the defendant, in its answer to plaintiff's Complaint, had alleged a special defense based on the arbitration provisions of the contract.

During the next seven (7) years, defendant made no attempt to proceed to arbitration but instead filed numerous pleadings including a counterclaim, motions, agreed orders and expensive discovery proceedings. The Sixth Circuit stated that "the delay . . . in moving for a stay was unreasonable and unexcusable under all the circumstances and constituted 'default' on its part in proceeding with arbitration."

For additional pertinent cases, see Blake Constr. Co. v. U.S., 252 F.2d 658 (5th Cir. 1958); American Locomotive Co. v. Gyro Process Co., 185 F.2d 316 (6th Cir. 1950); and La Nacional Platanera, S.C.L. v. No. American Fruit & S.S. Corp., 84 F.2d 881 (5th Cir. 1936).

Providence, in its brief, only cites one case that it believes to be in conflict with the present decision of the Fifth Circuit, Germany v. River Terminal Railway Co., 477 F.2d 546 (6th Cir. 1973). In Germany, a defendant specifically cited the arbitration provision of the agreement in a tendered amendment to a pleading in support of its position that a cross-claim failed to state a claim upon which relief could be granted. The Sixth Circuit held that under these circumstances, there was no waiver of the right to arbitration saying,

> "An agreement to arbitrate may be waived by the actions of a party which are completely inconsistent with any reliance thereon. Burton-Dixie Corp. v. Timothy McCarthy Const. Co., 436 F.2d 405 (5th Cir. 1971). However, waiver may not be inferred

> from the fact that a party does not rely exclusively on the arbitration provisions of a contract . . . . "

The decision in Germany is not in conflict with the decision of the Fifth Circuit for the facts of the two cases are dissimilar. In Germany, the arbitration provision of the agreement was specifically cited in a pleading, whereas in the present case Providence did not base its Motion to Dismiss or, in the Alternative, to Stay the Action on the ground that it desired to resort to arbitration. And in Germany the defendant relied on the arbitration provisions of the contract early in the lawsuit, whereas in the present cause Providence never tried to invoke arbitration until the case had been substantially litigated.

Providence cites Shanferoke C. & S. Corp. v. Westchester S. Corp., 293 U.S. 449 (1935) and General Guar. Ins. Co. v. New Orleans General Agency, Inc., 427 F.2d 924 (5th Cir. 1970) in support of its Petition, but the facts in both cases differ from those in the present case. In Shanferoke, the defendant set up in its answer, as a special defense, the arbitration provision of the contract. The defendant also moved that the action be stayed until arbitration could be had in accordance with the terms of the contract sued on. And in General, the defendant filed in the alternative to a motion for summary judgment, dismissal of the complaint for failure to state a claim, a motion to stay pending arbitration in accordance with the Federal Arbitration Act. In the present case Providence did not set up arbitration as a special defense in an answer nor did it file a motion to stay the action for purposes of resorting to arbitration.

Another contention of Providence is that arbitration was a condition precedent to suit. The law is clear that either party to a contract of arbitration may waive it. The provision may be waived by a plaintiff by initially bringing suit for damages without relying upon the provision or by a defendant not moving for a stay of the proceedings to resort to arbitration but instead actively litigating the issues in the lawsuit. La Nacional Platanera, S.C.L. v. North American Fruit & S.S. Corp., supra.

Providence's established post-suit actions in all phases of a complex litigation served as a waiver of its right to arbitration.

CONCLUSION

For all of the foregoing reasons, the Petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, David M. Thornton, hereby certify that true and correct copies of the foregoing Brief of Respondent Manhattan Construction Company of Texas In Opposition To The Petition For A Writ of Certiorari To The United States Court of Appeals for the Fifth Circuit were served upon the following parties by placing said copies in the United States Mail, postage prepaid on the 24th day of January, 1978:

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